

**DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA  
(BIDANG KUASA RAYUAN)  
RAYUAN SIVIL NO: C – 03- 30 TAHUN 2001**

**ANTARA**

**LEE BAK SOON @ LEE PAK CHOON                    .....                    PERAYU**

**DAN**

**RHB BANK BERHAD (6171 – M)                    .....                    RESPONDEN**

**(Dalam Perkara Kebankrapan No: 29 – 534 – 1994 di Mahkamah  
Tinggi Malaya di Kuantan**

**BER:                    LEE BAK SOON @ LEE PAK CHOON  
                          (K/P: 0381088)                    .....                    PENGHUTANG-PENGHUTANG**

**EX-PARTE: RHB BANK BERHAD  
                          (6171 – M)                    .....                    PEMIUTANG PENGHAKIMAN**

**CORAM:**

**MOKHTAR HAJI SIDIN, J.C.A.  
                          LOW HOP BING, J.C.A.  
                          MD RAUS SHARIF, J.C.A.**

**JUDGMENT OF LOW HOP BING, J.C.A.**  
**(DELIVERING THE JUDGMENT OF THE COURT)**

**I. INTRODUCTION**

**[1]** This is an appeal against the decision of the learned High Court judge in allowing the judgment creditor’s appeal and setting aside the decision of the registrar. The learned judge had in essence dismissed the application filed by the Judgment Debtor (“the JD”) under r95 of the Bankruptcy Rules 1969 (“r95”).

**[2]** The JD had appealed against the learned judge’s decision.

**[3]** This appeal was heard and dismissed on 20 June 2007. We now give our grounds.

[4] Parties have agreed that the outcome of this appeal shall also bind the parties in two other appeals viz Civil Appeals No: C-03-26-2001; and No: C-03-27-2001, pending in this Court.

## II. **FACTUAL BACKGROUND**

[5] On 31 October 1994, RHB Bank Berhad, the judgment creditor (“JC”) filed a bankruptcy notice against the JD to recover the sum of RM129,843.47, based on a judgment obtained under 014A of the Rules of the High Court 1980 on 2 February 1989 in Kuantan High Court Civil Suit No. 232-93-1998 (“the civil suit”). There was no appeal against that judgment.

[6] On 20 May 1995, the JD filed an affidavit in encl. (7) under r95. That was the JD’s application to set aside the bankruptcy notice (“the JD’s application”).

[7] The JD’s application was in relation to an auction of charged property pursuant to an order for sale granted by the

Kuantan High Court in OS No. 31-235-1986. (“the auction suit”). The grounds of the JD’s application are:

- (1) The JC’s claim for RM511.97 against the JD allegedly for legal fees, costs and expenses relating to Supreme Court Case No. 03-15-1989 (“the Supreme Court case”) was wrong in law (para 3.1. of the affidavit);
- (2) The demand contained in the JC’s bankruptcy notice should set off or reduce the sum of RM33,797.25 which was the interest charged by the JC against the JD for the JC’s own wrongful conduct in undervaluing the charged property (para 3.2 *ibid*);
- (3) There was a breach by the bidder who bided for RM160,000 for the charged property, paid 10% deposit but failed to pay the balance within the prescribed 90 days (para 3.3, *ibid*); and

(4) The 10% deposit paid by the bidder should have been forfeited and credited to the JD's account (para 3.4, *ibid*).

**[8]** On 14 August 1995, the JC filed an affidavit in reply thereto.

**[9]** The JD's application was heard on 12 March 1996 by the High Court registrar who set aside the JC's bankruptcy notice with costs.

**[10]** On 12 March 1996, *vide* encl. 11A, the JC filed an appeal to judge in chambers.

**[11]** On 26 July 2001, the learned judge allowed the JC's appeal with costs and reinstated the JC's bankruptcy notice. Hence, this appeal.

### **III. ACT OF BANKRUPTCY**

**[12]** Learned counsel Dato' Bastian Pius Vendargon relied on the grounds set out in the JD's affidavit, and submitted that the JD had committed no act of bankruptcy, citing:

- (1) *S.3(1)(i) and s.3(2)(ii) of the Bankruptcy Act 1967;*
- (2) *Re Arunachalam Ex. P. Indian Overseas Bank. Ltd (1968) 1 MLJ 89 HC;*
- (3) *Re United Marine Supply Co. (1960) 26 MLJ. 305 HC Singapore; and*
- (4) *Sovereign General Insurance Sdn. Bhd v Koh Tiam Bee (1988) 1 MLJ 304 SC.*

**[13]** JC's learned counsel Mr. Hon Kai Peng contended that:

- (1) the grounds raised in the JD's application should have been raised in the civil suit, the

auction suit; and/or in the Supreme Court case and the court exercising jurisdiction in bankruptcy proceedings cannot go behind the judgment obtained, relying also on *Sovereign General Insurance Sdn. Bhd, supra*; and

- (2) the JD's objection is not bona fide, on the strength of *Re Khoo Chee Tong: Ex Parte Unik (M) Sdn. Bhd (1996) 5 MLJ. 39 HC*.

**[14]** We found that in the civil suit, the 014A judgment which led to the JC's request for the issue of the bankruptcy notice against the JD is a final judgment as the JD has preferred no appeal nor obtained a stay of execution. The JC is entitled to enforce the final judgment. The JC is deemed to be a creditor under the proviso to s3(1)(i) of the Bankruptcy Act 1967 which, where relevant, provides inter alia to the effect that any person who is for the time being entitled to enforce a final judgment shall be deemed to be a creditor.

**[15]** There is no dispute that the JD's bankruptcy notice is in the prescribed form and has stated the consequences of non-compliance therewith and has been served in the prescribed manner under s.3(2) of the same Act.

**[16]** The result of our consideration of the authorities cited for the JD is reflected in the analysis below.

**[17]** In *Re Arunachalam, supra*, the bankruptcy notice demanded satisfaction of a judgment for RM4,344.64 as on 24 July 1967. It was undisputed that RM300 had been paid by the JD there, so that only RM4,044.64 was owing on the judgment. Chang Min Tat J (later FJ) invoked proviso (ii) to s.3(2) of the Bankruptcy Act 1967 and held that the bankruptcy notice was invalid as it referred to a sum in respect of which the JC could not have issued execution, in which case, the bankruptcy notice was set aside.

**[18]** In *Re United Marine Supply Co, supra*, the bankruptcy notice was for a claim which was more than the debt due. The claim for balance due on a final judgment had erroneously included a sum of \$50 which had been accepted by the creditor as payment towards the judgment debt. Rose CJ (Singapore) upheld the JD's contention that the defect, being not a mere formal defect or irregularity, could not be rectified by the Court.

**[19]** Except for the different amounts, both *Re Arunachalam, supra*; and *Re United Marine Supply Co. supra*, share substantially similar facts.

**[20]** However, in sharp contrast to *Re Arunachalam, supra*, and *Re United Marine Supply Co, supra*, the bankruptcy notice in the instant appeal carries a distinguishing feature in that the JD has made no payment in satisfaction or part satisfaction of a final judgment. That being the case, we are of the view that the JD's reliance thereon is unsustainable.

**[21]** It deserves to be noted that the grounds enumerated in the JD's application were based on the auction suit which has proceeded to the then Supreme Court by way of the Supreme Court case. Further, the JD has not lodged any appeal against the final judgment obtained by the JC under 014A in the civil suit which led to the issuance of the bankruptcy notice against the JD. The grounds raised in the JD's application should have been ventilated in the civil suit, the auction suit or the Supreme Court case. The JD's failure, refusal or neglect to do so would in our view militate against the JD's appeal before the High Court and now in the instant appeal in so far as the bankruptcy notice is concerned.

**[22]** In *Sovereign General Insurance Sdn. Bhd, supra*, pursuant to a judgment, a bankruptcy notice was issued against the JD who failed to comply therewith. The JC took out a creditor's petition which was struck out by the High Court judge who in the exercise of his jurisdiction in bankruptcy proceedings went behind the judgment and disputed the validity of the orders made in earlier execution

proceedings when the orders have not been set aside. On appeal, the then Supreme Court in a judgment delivered by Lee Hun Hoe CJ (Borneo) (as he then was) disapproved of the approach adopted by the High Court judge. At page 305, the Supreme Court referred to *In Re Easton (1893) 10 Mor. 111; 9 T.L.R. 409* and held that the High Court in exercising jurisdiction in bankruptcy proceedings, e.g. in an application to set aside a bankruptcy notice, could not go behind the judgment.

**[23]** The above principle enunciated in *Sovereign General Insurance, supra*, was followed by Haidar J (later CJ(M)) in *Re Khoo Chee Tong, supra*, where the Court dismissed the JD's attempt to set aside the bankruptcy notice on the ground, inter alia, that the judgment on which the bankruptcy notice was based was tainted with illegality.

**[24]** Quite apart from that, the JD's failure, refusal or neglect to raise the aforesaid grounds in the proper forum viz either in the civil suit, the auction suit or the Supreme Court case

clearly demonstrates a total lack of bona fide on the part of the JD.

[25] A similar situation arose in *Khoo Chee Tong, supra*, where the JD had never challenged the judgment entered against him but did so only when he filed a notice of motion (which was held to be procedurally wrong) alleging, inter alia, that the judgment was tainted with illegality. It was held to be lacking in bona fide.

[26] Reverting to the mainstream of the factual background herein, it is obvious that the JD has failed to comply with the requirements of the JC's bankruptcy notice. Consequently, he has committed an act of bankruptcy. We hold that the High Court has arrived at a correct decision in dismissing the JD's application.

### **III. CONCLUSION**

[27] On the foregoing grounds, we find no merits in the JD's appeal. By unanimous decision, the JD's appeal is hereby

dismissed with costs. The orders of the High Court are affirmed. Deposit to the JC towards account of taxed costs.

**[28]** Mokhtar Haji Sidin, JCA (as he then was) has retired in September 2007. Md Raus Sharif, J.C.A. who has read this judgment in draft has expressed his agreement for it to be the judgment of this Court.

**DATUK WIRA LOW HOP BING**

Judge  
Court of Appeal  
Malaysia

Dated this 20<sup>th</sup> November 2007.

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## **REFERENCES:**

- 1. S.3(1)(i) and s.3(2)(ii) of the Bankruptcy Act 1967;**
- 2. Re Arunachalam Ex. P. Indian Overseas Bank. Ltd (1968) 1 MLJ 89 HC;**
- 3. Re United Marine Supply Co. (1960) 26 MLJ. 305 HC Singapore;**
- 4. Sovereign General Insurance Sdn. Bhd. v Koh Tiam Bee (1988) 1 MLJ 304 SC;**
- 5. Re Khoo Chee Tong: Ex Parte Unik (M) Sdn. Bhd (1996) 5 MLJ. 39 HC; and**
- 6. In Re Easton (1893) 10 Mor. 111: 9 T.L.R. 409.**